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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

VICTOR K. EVANS,
Petitioner,

v.

UNITED STATES DEPARTMENT OF THE ARMY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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I.

QUESTIONS PRESENTED FOR REVIEW

A. Whether harmful procedural error occured in an adverse action against the Petitioner, a federal civilian employee, when the agency officials charged with separate review functions of his case, conducted ongoing ex parte communications as to the nature and merits of the charges.

B. Whether the presiding official assigned by the Merit Systems Protection Board to hear an adverse action against the Petitioner erred as a matter of law when he, in his final decision, reversed his ruling of harmful procedural error for improper ex parte contacts made at the end of the Agency's case and did not reopen the record to take further evidence.

C. Whether a federal employee may be

subjected to an adverse action when the Agency fails to act diligently and the charges are so untimely, as to prejudice the employee's ability to defend.

D. Whether the adverse action against the Petitioner can be sustained on hearsay statements not subjected to cross-examination.

E. Whether a federal agency should be permitted to appoint a deciding official to hear an adverse action when that deciding official has been the subject of whistleblowing activities by the party charged with the adverse action.

II.

PARTIES TO THE PROCEEDING

Victor K. Evans, Petitioner

United States Department of the Army, Respondent

III.

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OPINIONS BELOW

The decision of the Court of Appeals for the Federal Circuit was not published. The decision of the Merit System Protection Board was not published.

JURISDICTION AND DATE OF JUDGMENT SOUGHT TO BE REVIEWED

The judgment of the United States Court of Appeals for the Federal Circuit was entered on May 23, 1985. The Federal Circuit Court of Appeals had jurisdiction to review the decision of the Merit System Protection Board pursuant to 5 U.S.C. §7703. Jurisdiction of this Court is invoked under U.S.C. §1254(1) (1982).

V.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Fifth Amendment to the United States Constitution:

No person shall be ... deprived of life, liberty or property without due process of law.

5 U.S.C. §2302. Prohibited Personnel Practices.

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority--

(8) take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for--

(A) a disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences--

(i) a violation of any law, rule, or regulation, or

(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

VI.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Victor K. Evans, petitioner, has over thirty-three (33) years of government service which was capped (from October, 1973 until late March, 1983) as the head of the U.S. Army Material Development and Readiness Command's (DARCOM) Quality Assurance Field Activity (QAFA) located in Lexington, Kentucky. DARCOM is headquarted in Alexandria, Virginia and QAFA reported directly to DARCOM Headquarters.

In September, 1983 oral charges were brought against the petitioner, Victor K. Evans, for alleged sexual harassment by one of his subordinates, Carol Y. Patterson, a trainee in the Product Assurance & Test Field Activity (PATFA), an Activity within the Department of the Army located in Lexington, Kentucky. Patterson made charges of a sexual nature,

stemming from February-April, 1981. At that time Ms. Patterson spoke to a local EEO counselor who made a memorandum of the conversation but did nothing to proceed with investigation of the charges at Patterson's request.

Patterson's charge in March, 1983 was initially investigated by Ronald Shanks (EEO Officer from DARCOM Headquarters) from March 8-18, 1983. Mr. Shanks' recommendations were reviewed by Colonel Hugh Gracey, Commanding Officer of Lexington-Blue Grass Army Depot, as the proposing official.

By Notice of Proposed Removal, dated May 9, 1983, modified by an amendment dated May 20, 1983, Colonel Gracey proposed Mr. Evans' removal from his position within the Department of the Army (the Agency) for disgraceful conduct in the form of sexual harassment directed to a subordinate employee. The Notice stated that Ms. Patterson's allegations were the reasons for the proposed action.

The May 20, 1983 modification to the initial Notice of Proposed Removal added paragraph 2(d) which charges that Ms. Patterson perceived several work-related incidents beginning in April, 1982 and ending in March, 1983 to be the result of her refusal to comply with Mr. Evans' sexual advances in 1981. The initial removal proposal and its amendments were forwarded to John A. Lockerd as the Agency's deciding official. John Lockerd was Deputy Director for Product Assurance & Test at DARCOM Headquarters. Evans responded to the proposed removal on June 27, 1983 in writing to John Lockerd. On July 15, 1983 Lockerd issued his decision, ruling that Mr. Evans would be demoted to a lower grade non-supervisory position and transferred to Alexandria, Virginia. Mr. Evans thereafter filed a timely appeal to the Merit System Protection Board (MSPB) raising several points of error.

On December 7-8, 1983, a presiding official

of the MSBP heard the Agency's case. At the end of the Agency's case, the presiding official made two initial rulings of importance to this proceeding upon Evans' motion for a directed verdict:

(1) That the Agency failed to present a prima facie case of work-related retalitory actions and that that portion of the allegations would be dismissed (that is, paragraph 2(d) of the amended proposing letter);

(2) That in the absence of further evidence rebutting the finding, the presiding official found harmful prodecural error in the Agency's handling of the case. The presiding official's concern related to the ongoing ex parte communications by and between the proposing official (Colonel Gracey) and the deciding official (John Lockerd) and their respective legal staffs while Patterson's charges were under review. The MSPB presiding official was further concerned that obviously

the proposing and deciding officials (or at least their staffs) were discussing amendments to the charges while the latter had the initial charges under review:

> As far as the motion on the allegations concerning the improper taint, I am also troubled by the situation where the deciding official gets information from its legal staff that there is a problem with the proposals. Then he communicates--or at least impliedly communicates--that there is a problem with the proposals to the proposing official. To me, this smacks of the deciding official being the same as the Proposing Official .... If my feelings are swayed by what's in the deposition [Colonel Gracey's], I may not find there is harmful procedural error. But at this point, I am going to state that I will find harmful procedural error, as well.
>
> (December 8, 1983 hearing transcript)

As a result of this initial ruling, the presiding official found that the decision demoting Mr. Evans was too harsh and that he would at least order him reinstated to his prior GS-14 position in light of the dismissal of the "retaliation" charges and regard-

less of the ultimate ruling on the harassment charges.

The presiding official issued his final decision on December 30, 1983, finding for the Agency on the allegations of sexual harassment and imposing a thirty-day (30) suspension. The presiding official also ruled, in direct contradiction of his prior bench ruling at the end of the Agency's case-in-chief, that there was no harmful procedural error. In doing so he failed to explain why he reversed his prior decision upon which Evans relied in not presenting further evidence on this issue.

The case was timely appealed to the Merit Systems Protection Board which on July 30, 1984 ruled upon cross-petitions for error to deny Evans' petition and to grant the Agency's petition to the extent that the presiding official had mitigated the penalty. The United States Court of Appeals for the

Federal Circuit affirmed the Board's opinion on May 23, 1985.

B. STATEMENT OF FACTS

In December, 1977, Mr. Evans brought to the attention of the Director, Product Assurance and Test, HQ, DARCOM (John Lockerd's superior), a matter which related to a gross waste of public funds. The waste was associated with the acquisition and storage of material, costing hundreds of millions of dollars, that could not be issued to the soldiers for use in combat. In May and June, 1981, Mr. Evans spoke and wrote to Congressman Larry J. Hopkins, 6th Congressional District, Kentucky, about these matters since DARCOM Headquarters had not taken positive action to correct the situation. Mr. Lockerd, whose activities were questioned by Evans' letters, was aware of Evans' contact with the Congressman prior to the Patterson charges.

In late 1981 and early 1982, John Lockerd's superior undertook an action to restructure the reporting relationship that existed between Evans' Activity and DARCOM Headquarters. The restructuring significantly changed the person to whom Evans was responsible.

In September, 1982, John Lockerd presented a reorganization plan which purported to expand the mission of Evans' Activity by adding some professional engineering functions. Simultaneously, Mr. Lockerd proposed that the newly designated organization be headed by a person who qualified as a professional engineer. Mr. Evans, under the reorganization, became a subordinate branch chief.

On October 5, 1982, Mr. Lockerd visited the Army base at Lexington, Kentucky. During this visit, he apprised Colonel Gracey of the pending redesignation. Later that day, Mr. Evans was told of the proposed redesignation action. Evans and Lockerd continued prior

discussions over a dispute they had concerning the identity of Mr. Evans' rating official and Evans stated he wished to file a grievance.

On or about December 8, 1982, Mr. John A. Lockerd contacted Colonel Gracey to explain that actions were underway to fill the Engineer position as Chief of DARCOM PATFA and requested Colonel Gracey to serve as the Acting Chief over Mr. Evans for a period not to exceed ninety days. The first official record of Patterson's charges is a memorandum drafted by Edna Williams, a Lexington based EEO counsellor. According to the memo, on September 22, 1982, Patterson told Williams about her charges against Evans. Patterson asked that the charges not be acted upon, a request which was confirmed and agreed to by the Lexington EEO chief, Howard Rogers. When Ronald Shanks (Headquarters EEO Chief) learned of this procedure, he told Mr. Rogers it was not normal procedure and that normal procedure required

an immediate inquiry. Nevertheless, in this case, Shanks did not tell him to proceed:

> Q. And you [Shanks] explained to him [Rogers] that that was not usual procedure from your end, is that correct?
>
> A. That's correct.
>
> Q. And that your normal procedure would have been to immediately tell the complainant when you learned that they were -- wanted to be off-the-record that you wouldn't deal with them off-the-record and give them the choice to stop or continue going on?
>
> A. That's correct.
>
> Q. Okay. And that if they continued on, you would go to the commanding officer, is that not correct?
>
> A. That's correct.
>
> Q. Okay. And November of 1982 when you spoke with Rogers, you did not tell him to go to the commanding officer did you, when you learned he had an off-the-record conversation?
>
> A. No, I did not.

In early March, 1983, Carol Y. Patterson, quality Assurance Specialist (trainee), PARFA

again contacted the Equal Employment Office, LBDA, and reinstituted her oral allegation of sexual discrimination in the form of sexual harassment against Evans. As noted before, Patterson made allegations of a sexual nature, stemming from February through April, 1981 and of work-related retaliation for April, 1982 to March, 1983.

Mr. H. Rogers, LBDA-EEO officer, and Ms. Patterson discussed the allegations on March 3, 1983. Following that discussion, Mr. Rogers contacted DARCOM headquarters to determine whether a LBDA-EEO counsellor or a heardquarters EEO counsellor should conduct the pre-complaint processing actions associated with filing and presentation of a complaint as required by 29 CFR 1613-213 and 1613-214. Mr. Ronald Shanks, Chief of the headquarters EEO Office, decided that he would conduct an inquiry into the allegations. The inquiry was performed between March 8 and March 18,

1983.

During the course of Shanks' inquiry, specifically on March 16, 1983, a meeting was held between Colonel Gracey, Mr. Shanks, Mr. Renkey (Legal Officer, LBDA) and possibly Mrs. Barbara Kirkpatrick (Civilian Personnel Officer, LBDA) to contrive a plan to be proposed to Mr. Evans' representative which would cause Mr. Evans to accept early retirement in lieu of being officially charged with sexual harassment. The scheme was discussed on a conference telephone call with Mr. John A. Lockerd.

It is without question that as early as October 5, 1982 the deciding official in this case, John Lockerd, became an integral part of the prosecution process in which he finally became the decision maker. Lockerd was at the Lexington base on October 5, 1983 and had been specifically requested by Colonel Gracey to meet with Howard Rogers (the local EEO officer) to give him fifteen minutes to

discuss the matter.[1] On October 5, 1983, Lockerd met with Howard Rogers who told Lockerd he had received charges of sexual harassment against Mr. Evans, but that the complainant did not want to go "on-the-record." Lockerd then met with Colonel Gracey on the matter.

Although Lockerd asserts that these "off-the-record" charges meant nothing to him and that they should have not been brought to his attention, it is undisputed that he asked Rogers to keep him informed and shortly thereafter Lockerd called Ronald Shanks, his EEO Officer at DARCOM Headquarters in Alexandria, Virginia, and asked him about Mr. Rogers' competence and the charges raised "off-the-record." (See Shanks testimony.)

It is further undisputed that at this time (about October, 1982), Lockerd appointed

---

[1]The record below contains Colonel Gracey's handwritten note to Mr. Lockerd, stating that "Howard Rogers needs fifteen minutes," while Lockerd is at the Lexington-Bluegrass base.

Shanks to "watch over the matter" and "keep him informed." (Lockerd testimony.) Although Shanks is "not in a position to direct Mr. Rogers to do something" (Shanks testimony), he nonetheless called Rogers and discussed the charges and procedure with him (Shanks testimony). Shanks testified that Lockerd felt "frustrated" and "stymied" that Ms. Patterson had refused to make a formal complaint in October, 1982 (Shanks testimony).

On or about December 6, 1982, Howard Rogers' notes reflect that he called Lockerd to give him a status report on the Patterson matter (Rogers and Lockerd testimony). Rogers did this because Lockerd "asked" him to do so (Rogers testimony).

Shanks also spoke with Rogers and Lockerd around Christmas, 1982 to kept Lockerd apprised (Shanks testimony). It is clear that Rogers was keeping Shanks abreast of the matter (Shanks testimony) and Shanks, in turn, was keeping

Lockerd informed (Lockerd testimony). Lockerd was pushing for results.

Shanks disclaims any direction from Lockerd, but he has never fully explained why he was so concerned about keeping Lockerd informed about the Evans matter that he would go the such lengths to keep in contact with Rogers over whom he had no control about a matter which was essentially "off-the-record." The best explanation is the cbvious one--that Lockerd directed him to watch the situation and once it was a formal complaint to "get" Mr. Evans regardless of the cost. This much can be gleaned from Shanks' testimony:

> A. ... I'm not in a position to direct Mr. Rogers.
>
> Q. Okay. What were you doing calling Mr. Rogers in the first place, then?
>
> A. I was trying to ascertain what the status of the situation was.
>
> Q. Okay. And what were you going to do with the information, if you had no authority over Mr. Rogers,

or you didn't intend to do anything at all?

A. Mr. Lockerd had asked me for advice and I wanted to be aware of the facts of that situation in order to ensure that the advice I'd given him was appropriate.

Q. I'm sorry. Was it your impression from Mr. Lockerd that he wanted to get on with it, that being the inquiry?

A. It was my impression that he did not want to be in a situation where there might be an allegation raised in which he couldn't act. He wanted to take an active role in this case.

In March, 1983, when Patterson made allegations against Mr. Evans, Shanks was called by Rogers (Shanks testimony) who appointed himself the investigating official. Colonel Gracey, too, called Lockerd and told him that he had transferred Ms. Patterson out of Mr. Evans' workforce -- Colonel Gracey felt a need to keep Lockerd posted (Gracey testimony). During Shanks' stay in Lexington, he had at least two conversation with Lockerd, concerning the merits of the allegations even though

he knew at that time Lockerd was a likely candidate for the deciding official status (Shanks and Lockerd testimony). Indeed, Shanks' report stated that he decided not to interview Lockerd on the merits of the charges despite Mr. Evans' request that he do so because of the fact he anticipated that Lockerd would be the deciding official.

During one of these conversations, a conference was held with Lockerd via telephone conference call which included Colonel Gracey, Ms. Kirkpatrick (the LBDA-CPO), Shanks and Colonel Gracey's counsel, and during which it was made clear to Lockerd that the charges had substance and merit (Lockerd testimony), and that they were seeking his permission to go forward with a resolution contemplating Mr. Evans' forced early retirement (Shanks testimony). Colonel Gracey first raised the possibility of a forced early retirement plan in March, 1983 (Shanks testimony), but Colonel

Gracey felt Lockerd's approval was necessary. The scheme involved assigning Mr. Evans out of LBDA and if he declined reassignment, he would be forced into an early retirement. (Ironically enough, Lockerd's final decision in this matter required Evans to transfer to Alexandria, Virginia despite ten years of service at LBDA.)

Thereafter, Shanks issued his decision and recommendations and forwarded them to Colonel Gracey, who permitted Ms. Patterson to review them.

During the period in which Colonel Gracey had the matter under consideration (March 18 - May 9, 1983), he had continuous, if not daily, phone conferences with Lockerd to speak to him about the case. These calls began during Shanks' investigation and continued at the frequency of two to three times per week until mid-April (Gracey testmony):

> Q. Why did you [Gracey] call Mr. Lockerd about that or speak

with him about that, regardless of who called who?

A. Supervised [sic] and supervisor relationship, so that he would be informed of what was occurring.

Q. In point of fact, he had earlier requested you keep him informed what was going on with the investigation?

A. Yes.

Q. And as of this point he knew the details of the investigation, as of May 20th?

A. Oh, yes, because think he had already discussed this with Mr. Shanks.

Q. And as of May 9th he knew the details the day you issued your proposed action letter?

A. Yes.

Q. And, indeed, during the investigation, which I represent to you ended March 18th .... Do you have any quarrel with that date?

A. No.

Q. Mid-March?

A. Mid-March.

Q. And at that point he knew all the facts as you knew them?

A. It would have to be subsequent to

> the 18th because as I recall it was about a mid-week when Ron Shanks departed to come back here. So I would say that it was subsequent to that that he knew, 'he' being Mr. Lockerd, knew anymore finite details than what had been passed over on the telephone on an information basis.
>
> Q. But by the end of March he would have known what was going on?

By late March, Lockerd knew from Colonel Gracey what the details of the charges were. Essentially, Colonel Gracey was transmitting to Lockerd information about the charges as he was learning them from Shanks.

Colonel Gracey's initial proposing letter was issued on May 9, 1983 and as discussed above is modified by amendment dated May 20, 1983. The amendment was used to add paragraph 2(d) of the present charges which speak toward the work-related retaliation allegations. Their modification was based upon communications between Colonel Gracey, Lockerd and their respective legal staffs (Lockerd and Gracey

testimony).

Q. Do you [Gracey] recall when you had this conversation with Lockerd about the modification letter? Obviously, it was between May 9th and May 20th, but where in that time frame?

A. It was after the decision was made to introduce the modification.

Q. Okay.

Do you recall having already written the letter at that point?

A. It was in quasi draft at that time, yes.

Q. With repect to the base letter and the modification letter, did you actually do the first draft or did you have Legal or CPO--

A. (Interposing) Legal and CPO made the first draft of the first letter, and the amendment.

* * *

Q. Did you tell Mr. Lockerd what you were putting in the modification letter before it came out?

A. I don't think so. And I say that because I--the phone call was subsequent to the modification letter.

Now, it goes without saying my lawyer was talking to DARCOM Legal. And I don't know if there was a conversa-

tion other than that, but I didn't until the --Well, let me put it this way: The letter was in draft as to what I was accepting, and it may not have been firmly published when I talked to Mr. Lockerd, but the letter was--the amendment was already locked in.

* * *

Q. He didn't tell you--Well, when is the first instance the thought of a modification letter arose to you, either by you thinking of it or somebody bringing it to your attention?

A. A combination of DARCOM Legal and my Legal, and coming to me and indicating that the base letter for removal didn't include all of those factions which were in the investigation.

Q. And that---

A. (Interposing) Supportive.

Q. And that would be either Mr. Renkey [Gracey's "Legal"] or Mr. Klatsky [Lockerd's "Legal"] that told you?

Q. And what was your understanding about why this mattered at this point?

A. There was quite a discussion between my lawyer and myself as to why mess with the letter, and a long discussion of two or three days--Indications were that I had not, all inclusive,

all of the information from the investigation to support the base letter for removal.

* * *

Q. In issuing the May 20th modification letter, addition letter, whatever you want to call it, did you speak with Mr. Lockerd?

A. No; my lawyer and once or twice to Steve [Klatsky, Lockerd's "Legal"].

Q. If I told you that Mr. Lockerd told me the modification letter was coming, does that refresh your memory that you spoke with him, told him something was coming about it?

A. I told Mr. Lockerd that I was putting out a modification letter.

Q. Well then, prior--the prior answer was not quite accurate.

What did you tell Lockerd about the May 20th letter before it was actually issued?

A. My lawyer, and of course Steve and I were preparing the modification to the base letter.

Q. What did you tell him about what you were changing to the letter or adding to the letter?

A. Just as I said earlier, that there wasn't enough describing--description in the base letter to the allegation.

VII. REASONS FOR GRANTING THE WRIT

As a result of this Court's decision in Bush v. Lucas, 462 U.S. 367 (1983), federal employees are, for all practical purposes, relegated to their hearing rights under the Civil Service Reform Act (CSRA). This means, of course, that federal employees faced with adverse actions must rely on the procedural due process rights afforded by internal agency review and the Merit Systems Protection Board.

In light of Bush v. Lucas, it has become of paramount importance that the rights of federal employees be preciously safeguarded from the initial agency action. In the scheme of the CSRA, this procedure begins with internal agency review by a proposing official followed by the review of a deciding official. This separation of functions requires that these officials be unbiased, independent decision makers and all communications between them should be scrupulously reviewed. Any hint

of impropriety should be avoided so as to assure due process.

Certainly the type of ex parte communications between the proposing and deciding officials which occurred in this case are improper and denied Mr. Evans his due process rights.

It is imperative that this Court give a definitive opinion on the propriety of ex parte communications by and between agency officials who are reviewing charges of misconduct against federal employees, since the rights of several million civilian employees hang in the balance.

The Court of Claims and now the Federal Circuit have issued a number of decisions on the issue of improper communications, but none of them leave the millions of federal employees with any specific standards to govern their conduct. Compare, Camero v. United States, 345 F.2d 798 (1965); Ryder v. United

States, 585 F.2d 482 (Ct.Cl. 1978); Sullivan v. Department of the Navy, 720 F.2d 1266 (Fed.Cir. 1983), and Welcker v. United States, 752 F.2d 1577 (Fed.Cir. 1985). The seminal case on ex parte contacts is Camero v. United States, 345 F2d 798 (Ct.Cl. 1965) and 375 F.2d 777 (Ct.Cl. 1967). In that case a hearing was set up to adjudicate charges of falsely certifying travel vouchers against a civilian Army employee. The deciding official solicited comments from, among others, the Army attorney who prosecuted the case. The Court struck down the procedure. Camero was followed by Sullivan v. Department of the Navy, 720 F.2d 1266 (Fed.Cir. 1983), where the court reversed an employee dismissal on the grounds of ex parte communications.

The Federal Circuit has now retreated from these decisions in Welcker v. United States, 752 F.2d 1577 (Fed.Cir. 1985) and in the case at hand. In Welcker, the Federal

Circuit has now held that ex parte communications are only impermissible if they violate some regulation, statute or practice. This apparently is so (as far as the Federal Circuit is concerned) even if constitutional guarantees are at stake. The court in Welcker recognized its apparent inconsistency with Sullivan by noting that in Sullivan, "the court made no mention of particular regulations violated" by the ex parte communications. Nevertheless the court simply assumed that the Sullivan decision was impliedly in agreement with the Welcker opinion.

This inconsistency of opinions, on a matter of grave importance and all federal employees, should not be allowed and this court should issue a dispositive ruling on the issue. Similarly, a federal employee must be secure from disciplinary charges that stem from events so stale in time as to deny the employee due process if those charges

are pursued or if it is clear that the Agency has failed to act with diligence. Heffron v. United States, 405 F.2d 1307 (Ct.Cl. 1968).

In this case, the charging party filed her charges originally in September, 1982. Despite this, and in violation of normal practice, the charges were not pursued until March, 1983, some twenty-two (22) months after the date it was claimed Mr. Evans last made sexual advances toward the charging party. The Heffron case mandates that the charges against Mr. Evans be dismissed because the Agency failed to act diligently and Mr. Evans was prejudiced by the delay.

Finally, this case presents for review the all-important question of whether whistleblowing activities are truly protected by the CRSA. If such activities from the basis of adverse employment decisions against a federal employee, they constitute prohibited personnel practice protected by 5 U.S.C. §2302.

Although Mr. Evans established a prima facie case of whistleblowing activities, the Agency failed to rebut this evidence. Nevertheless, the opinions to date in this case have ignored this.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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AUGUST, 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VICTOR K. EVANS,	)	Appeal No. 85-653
	)	
Petitioner,	)	
	)	
v.	)	
	)	
DEPARTMENT OF THE ARMY,	)	MSPB Decision
	)	No. AT07528311109
Respondent.	)	

DECIDED: May 23, 1985

Before BALDWIN, Circuit Judge, COWEN, Senior Circuit Judge,
and NEWMAN, Circuit Judge.

BALDWIN, Circuit Judge.

DECISION

The decision of the Merit Systems Protection Board (board), sustaining the agency's

demotion action based on charges of sexual harassment, is affirmed.

OPINION

We agree with the board that there was no harmful procedural error to merit reversal. Although petitioner argues that the presiding official "found harmful procedural error subject only to his review of Col. Gracey's deposition" and erred in his initial decision in failing "to state any basis upon which he reversed his initial findings in this regard," our review of the relevant part of the transcript made during the motion for directed verdict indicates that the presiding official took the issue of harmful procedural error under advisement. Indeed, the presiding official and the board correctly determined that no harmful procedural error occurred. Petitioner

has failed to show that the ex parte contacts among the proposing official, deciding official, and their staffs were contrary to procedures defined by statute, regulation, or practice. See Welcker v. United States, 752 F.2d 1577, 1985). Additionally, petitioner has not denied that the proposing and deciding official could be the same individual. Petitioner's other allegations of procedural error are adequately treated in the presiding official's initial decision and in the board's opinion and order.

Petitioner's arguments relating to substantial evidence must also be rejected in view of the investigation report and testimony from the witnesses. No citation is necessary for the proposition that written statements are admissible and may constitute substantial evidence to support an administrative determination despite their hearsay character.

Finally we concur with the board's decision to sustain the agency's demotion penalty. The agency's decision to demote petitioner to a non-supervisory position was entirely reasonable in view of the finding that petitioner had sexually harassed a female subordinate.

APPENDIX B

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

VICTOR K. EVANS	
v.	DOCKET NUMBER AT07528311109
DEPARTMENT OF THE ARMY	

OPINION AND ORDER

Appellant was demoted from his position as Supervisory Quality Assurance Specialist, GS-14, to Quality Assurance Specialist, GS-13, based on charges that appellant sexually harassed a subordinate and unreasonbly interfered with her work performance in retaliation for rejecting his advances. On appeal, the presiding official sustained the charge of sexual harassment, but did not sustain that part of the charge concerning retaliation. Because

part of the charge was not sustained, the presiding official mitigated the agency-imposed penalty of demotion to a thirty-day suspension. The agency and appellant have both petitioned for review of the initial decision.

The agency's petition is hereby GRANTED pursuant to 5 U.S.C. Section 7701(e)(1).

The basic contention raised by the agency in its petition is that the presiding official improperly substituted his judgment for that of the agency on the question of the appropriateness of the penalty, rather than limiting his role to assuring that managerial discretion was not abused and that the penalty was within the bounds of reasonableness. We agree.

The presiding official based his decision to mitigate on several factors: failure to sustain the retaliation portion of the charge; appellant's potential for rehabilitation;the

length of time which elapsed between the cessation of the harassment and the notice of proposed adverse action; and appellant's unblemished record of twenty-nine years of service.

In Douglas v. Veterans Administration, 5 MSPB 313 (1981), the Board indicated that numerous factors are relevant to consideration of whether an agency-selected penalty is reasonable under the circumstances of a particular case. While the factors considered by the presiding official are significant under Douglas, the nature and seriousness of the offense, and its relationship to the employee's duties, are equally so.

Sexual harassment is an extremely serious type of misconduct. The agency has an obligation to its employees to create and maintain a work environment free of sexual harassment.

See Snipes v. U.S. Postal Service, 6 MSPB 16 (1981). The agency must necessarily accomplish its goal through its supervisors. By sexually harassing his subordinate on repeated occasions, appellant violated the trust the agency placed in him as a supervisor to treat his subordinates with respect and to ensure that the work place was free of sexual harassment.

Consideration of all of the factors relevant to appellant's penalty leads the Board to conclude that the presiding official erred in modifying the agency-imposed penalty. The Board's role in the process of assuring an appropriate penalty is limited:

> Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case. The Board's role in this process is not to insist that the balance be struck precisely

> where the Board would choose to strike it if the Board were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce Douglas at 328

We find that the penalty of demotion is within the limits of reasonableness under the circumstances.

Appellant's petition for review contains numerous allegations of error. Appellant argues that the presiding official erred in "reversing his decision on the issue of harmful procedural error without substantiating the grounds for the reversal" and that harmful error did, in fact, occur because of improper contacts between the proposing and deciding officials. Although appellant claims that he relied on a "bench ruling" made by the presiding official on the issue, the record reveals that the presiding official stated

that "[i]f my feelings are swayed by what's in the deposition, I may not find that there is harmful procedural error." Hearing Transcript at 155. We agree with the presiding official's ultimate analysis of the issue and his conclusion that if any error did occur, appellant was not harmed by it. Initial Decision at 24.

Appellant also contends that the agency charges against him were stale, having been brought twenty-two months after appellant was alleged to have made sexual advances. We note, however, that the agency acted as soon as Ms. Patterson raised her allegations of harassment, and that appellant failed to show prejudice to his defense by the delay.

Appellant's remaining arguments relate to the presiding official's factual determinations and evidentiary assessments. We find

that he has not demonstrated any factual error by the presiding official, based on specific reference to the record, sufficient to warrant the Board's full review. See Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980).

Thus, appellant's petition for review is hereby DENIED for failure to satisfy the criteria for review set forth at 5 C.F.R. Section 1201.115.

Accordingly, the initial decision is AFFIRMED as MODIFIED by this Opinion and Order to SUSTAIN the agency-imposed penalty of demotion.

This is the final Order of the Merit System Protection Board in this appeal. 5 C.F.R. Section 1201.113(c).

The appellant is hereby notified of the right under 5 U.S.C. Section 7703 to seek judicial review of the Board's action by filing

a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D. C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

30 July, 1984 /s/
(Date) Paula A. Latshaw
Acting Secretary

Washington, D.C.

Supreme Court, U.S.
FILED
OCT 22 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-300

In the Supreme Court of the United States

OCTOBER TERM, 1985

VICTOR K. EVANS, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner, a civilian employee of the Department of the Army who was demoted one grade level and transferred after he was found to have sexually harassed a subordinate female employee, principally argues that contacts between agency officials considering the charge against him invalidate his demotion.

1. a. In March 1983, Carol Patterson, a civilian employee of the United States Army Materiel Development and Readiness Command (DARCOM) in Lexington, Kentucky, brought formal charges of sexual harassment against petitioner, who was then her immediate supervisor. Patterson had previously complained to an Equal Employment Opportunity officer in October 1982 but had not filed formal charges (*Evans* v. *Department of the Army (Initial*

Decision), No. AT07528311109 (MSPB) Dec. 30, 1983), slip op. 21).[1] Patterson charged that petitioner made repeated sexual advances to her in 1981, despite her consistent attempts to rebuff him. She specifically alleged that petitioner made verbal and physical advances at hotels while petitioner and Patterson were traveling on government business, made frequent telephone calls to her home on evenings and weekends, and repeatedly called her into his office for "counseling" sessions at which he repeated these unwanted advances. Patterson also charged that, because she rejected his sexual advances, petitioner retaliated against her at work in various ways. Initial Decision 2-4.

Patterson's charges were investigated by the chief of the DARCOM headquarters Office of Equal Opportunity, who sent a report in March 1983 to Colonel Gracey, the commanding officer of the Lexington, Kentucky, facility. Colonel Gracey, the "proposing official," sent a notice of proposed removal to petitioner in May 1983 setting forth the charges summarized above. Petitioner's attorney filed a response to the charges with John Lockerd, petitioner's superior, who had been designated as the "deciding official." After reviewing the file, Lockerd found that the charges were supported by the evidence, but he reduced the proposed removal to a demotion from petitioner's supervisory GS-14 position to a non-supervisory GS-13 position. The demotion necessitated a transfer to DARCOM headquarters in Alexandria, Virginia. Initial Decision 1-4.

b. Petitioner appealed his reduction-in-grade to the Merit Systems Protection Board (MSPB). After discovery, a two-day evidentiary hearing, and post-hearing briefing and argument, the MSPB presiding official upheld the

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[1]We have lodged a copy of the Initial Decision with the Clerk of the Court.

charges of sexual harassment. Initial Decision 19. The presiding official credited Patterson's testimony that petitioner attempted to fondle her, "touching her breasts, waist and hips at various times," and concluded that petitioner's denials were not credible (*id.* at 5-9). However, he concluded that the charges of retaliation against Patterson were not adequately substantiated (*id.* at 17).

The presiding official rejected petitioner's claim that improper contact between the deciding official, Lockerd, and the proposing official, Colonel Gracey, tainted the proceeding. Specifically, petitioner complained because Lockerd, as petitioner's supervisor, was notified in October 1982 when Patterson first complained to the EEO office; that Lockerd was told by the investigators that Patterson's charges had merit; and that Lockerd advised Colonel Gracey, after he submitted his proposal that petitioner be removed, that the proposal did not contain sufficient information concerning the allegation that petitioner retaliated against Patterson (Initial Decision 21-22). The presiding official found no violation of petitioner's procedural rights, noting that there is no general proscription of appointing a deciding official who is familiar with the facts of a case (*id.* at 23). The presiding official specifically found that Lockerd had no actual bias against petitioner (*ibid.*).

The presiding official also rejected petitioner's "whistleblowing" claim. Petitioner alleged that the Army took disciplinary action against him in reprisal for writing his congressman to complain about mismanagement. Noting that petitioner sent the complaining letters shortly after he was informed of the sexual harassment charges, the presiding official concluded that petitioner "failed to demonstrate that there was any causal connection between his letters to his congressman and the agency action" (Initial Decision 25).

Because the charge that petitioner retaliated against Patterson was not sustained, and because of other mitigating factors, including petitioner's long record of service, the presiding official reduced the penalty to a 30-day suspension. Initial Decision 27.

c. On cross-appeals to the full MSPB, the Board reinstated the reduction-in-grade. Because "[s]exual harassment is an extremely serious type of misconduct" (Pet. App. 7), the Board found that the reduction-in-grade was a reasonable penalty (*id.* at 9). The Board dismissed petitioner's claim that there was improper contact between the proposing and deciding officials, as well as petitioner's argument that the presiding officer had not adequately explained his ruling that there was no procedural error. The Board "agree[d] with the presiding official's ultimate analysis of the issue and his conclusion that if any error did occur, [petitioner] was not harmed by it" (*id.* at 10).

The Board briefly addressed petitioner's argument that the claims against him were stale because they were brought 22 months after he made his sexual advances. The Board concluded that the agency moved promptly once formal charges were made and that petitioner "failed to show prejudice to his defense by the delay" (Pet. App. 10). The Board denied petitioner's other requests for review of the presiding official's decision.

d. The court of appeals affirmed in an unpublished opinion (Pet. App. 1-4). The court held that "the presiding official and the board correctly determined that no harmful procedural error occurred" (*id.* at 2). Citing *Welcker* v. *United States*, 752 F.2d 1577 (Fed. Cir. 1985), the court noted that the contacts between the proposing official and the deciding official were not contrary to any statute, regulation, or practice. Indeed, "petitioner has not denied that

the proposing and deciding official could be the same individual" (Pet. App. 3). The court rejected petitioner's other procedural challenges on the basis of the opinions by the Board and the presiding official and concluded that the penalty of demotion was reasonable (*id.* at 3-4).

2. The decision in this case is correct, presents no conflict among the circuits, and raises no significant legal issue. Accordingly, review by this Court is not warranted.

a. Petitioner's principal assertion is that the entire course of the proceedings against him is somehow tainted by the contacts between Lockerd and Colonel Gracey during the initial stages of the proceedings (Pet. 26-29). The court of appeals correctly recognized, however, that this case is squarely controlled by its recent decision in *Welcker,* in which the court concluded that there is no per se rule barring ex parte contacts among government officials involved in a personnel matter. Rather, the court held that prior cases established the principle that ex parte contacts invalidate a personnel action only where they occur in contravention of existing regulations, statute, or practice (752 F.2d at 1582-1583). In the present case, the court found that petitioner had made no showing of any such impropriety in the challenged contacts. In seeking review in this Court, petitioner does not assert that the Federal Circuit's *Welcker* rule, as applied in this case, is in conflict with a decision of any other court of appeals.[2] Nor has petitioner

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[2]Petitioner argues that *Welcker* is inconsistent with prior decisions of the Federal Circuit, notably *Sullivan* v. *Department of the Navy,* 720 F.2d 1266 (1983) (Pet. 28-29). The decision in this case is not inconsistent with *Sullivan.* In that case, the employee's supervisor, whom the court described as "a true adversary with motives of reprisal" (720 F.2d at 1272) because the employee had recently filed a grievance against him, repeatedly urged the deciding official to remove the employee. This case is quite different, because there is no adversary with motives of reprisal since there is no merit to petitioner's whistleblowing claim. In addition, in *Welcker,* the court of appeals distinguished *Sullivan,*

attempted to show that he was prejudiced by the contacts that he alleges invalidate his demotion. In these circumstances, review is not warranted.

b. The other issues raised by petitioner do not merit review either. Petitioner asserts that the charges against him were stale (Pet. 29-30), even though the investigation was completed within two weeks of the filing of Patterson's formal complaint and a notice of proposed action was forwarded to him within two months thereafter. As the MSPB pointed out in its decision, petitioner has made no showing of prejudice from any delay. Nor is there any merit to petitioner's assertion that he "established a *prima facie* case of whistleblowing activities" and that the Army was required to "rebut this evidence" (Pet. 30-31). As the presiding official concluded, petitioner's letters to his congressman, which appear to have been an obvious attempt to construct a whistleblowing claim, did not lead to his demotion. Initial Decision 25.[3]

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noting that the court there evidently believed that the ex parte contacts at issue were clearly barred by applicable regulations, statute, or practice. 752 F.2d at 1583 n.3. Here, in contrast, the court found no violation of a regulation, statute, or practice. In any event, even if there were an inconsistency among the precedents of the Federal Circuit, such an issue would be appropriate for rehearing before that court en banc, not review before this Court. Petitioner did not seek rehearing en banc in this case.

[3]Petitioner lists two additional "questions presented for review" that are not discussed in his petition. Petitioner asserts that the presiding official erred, in his written decision, by reversing his prior oral "ruling" regarding petitioner's claim of ex parte contacts (Question B, Pet. ii). However, both the court of appeals and the MSPB found, after reviewing the hearing transcript, that the presiding official had not decided the issue but had simply taken the question under advisement (Pet. App. 2, 9-10). Petitioner also questions whether an adverse personnel action may be supported by hearsay evidence (Question D, Pet. iii). The court of appeals correctly held that written statements may be relied upon in administrative determinations, despite their hearsay character (Pet. App. 3). See *Richardson* v. *Perales*, 402 U.S. 389, 402 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

OCTOBER 1985

DOJ-1985-10